

# Overstating the “Americanization” of International Arbitration: Lessons from ICSID

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## I. INTRODUCTION

The observation that international commercial arbitration has become “Americanized”<sup>1</sup> raises more questions than it answers. For example, what does Americanized mean? Americanization suggests international arbitration is akin to dispute resolution in the United States.<sup>2</sup> For some non-Americans, the observation has normative consequences; it means “unbridled and

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<sup>1</sup> See, e.g., Arthur Marriott, *The Arbitrator’s Responsibilities for the Proper Conduct of Proceedings*, in INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY 80, 81 (Albert Jan van den Berg ed., 2001) (observing that “US litigation techniques . . . are leading to dramatic increases in the cost of settling disputes” and urging that the influence “must be resisted” or “great damage will be done to the international arbitral process”); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 51–57 (1996) (describing the increasing influence of “Anglo-American law firms” in international arbitration and the “offensive brought by the American lobby . . . to rationalize the practice of arbitration such that it could become offshore-U.S.-style-litigation”); Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 96 (2000) (stating that, in terms of procedure, international commercial arbitration “is becoming more and more like public court litigation, particularly public court litigation as practiced in the United States”); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 435 (2000) (describing the rise of the “American law firm model” in Europe as leading “to a more aggressive and confrontational style of litigation, displacing the earlier Continental model of the pipe-smoking professor/arbitrator with his ‘oracle of the law’ mode of producing courtroom legitimacy”). But see Lucy Reed & Jonathan Sutcliffe, *The ‘Americanization’ of International Arbitration?*, 16 MEALEY’S INT’L ARB. REP. 37 (2001) (noting that international arbitration is “increasingly ‘homogenized’ rather than ‘Americanized’”).

<sup>2</sup> For a definition of the “Americanization” of another country’s law, see Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL’Y INT’L BUS. 391, 396 (1993) (accusing the United States of trying “to ‘Americanize’ Mexico—to promote a political and economic system in Mexico that more closely reflects our own”).

ungentlemanly” conduct or a strategy of “total warfare.”<sup>3</sup> Can the American process fit into a neat and simple descriptive box in which winning at all costs is the ultimate goal? No. The conduct of American lawyers varies from one part of the United States to the next, if not among individual members of the bar.<sup>4</sup>

As another example, are certain practices used in American dispute resolution unique to the United States? Perhaps the relevant inquiry is whether international commercial arbitration has become more adversarial, like the judicial process in the United States or the United Kingdom.<sup>5</sup>

Does Americanization refer only to the process or does it extend to the arbitral award? Is an award that cites and relies on other arbitral awards an American one?<sup>6</sup> Is an arbitral award that offers a factual recitation and legal analysis an American award because it resembles the published decisions of U.S. federal courts?

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<sup>3</sup> Nicolas C. Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L ARB. REP. 24, 24 (2001).

<sup>4</sup> See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 U.C.L.A. L. REV. 1871, 1927–28 n.266 (1997) (recognizing “regional differences in case types, attorney practice routines, and other legal cultural variables”); see also Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 776, 782 (1994) (observing that “the judiciary and attorneys have differing and sometimes conflicting goals” and also describing the influence of women and diversity, all of which give rise to differences in conduct).

<sup>5</sup> The author thanks Abby Cohen Smutny of the International Arbitration Practice Group of White & Case, LLP for this insight; see also Reed & Sutcliffe, *supra* note 1, at 37 (noting that “‘Americanization’ implies something of an excessive influence of Anglo-American or common law legal traditions on international arbitration, originally a European/civil law phenomenon”). Commentators also refer to the “judicialization” of international arbitration. See Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT’L L.J. 89, 95 (1995) (describing the “common law ‘judicialization’” of international arbitration); see also Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341, 352 (2002) (recognizing that international arbitration has “become a more formalized and legalized dispute resolution process”). But see José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 411–15 (2003) (describing as a “half-truth” the principle that “[t]he recent proliferation of international tribunals constitutes the ‘judicialization’ of international law”).

<sup>6</sup> For an analysis of the role of stare decisis in the decisions of the Appellate Body of the World Trade Organization, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845, 847–48 (1999) (noting the trend “away from the old-fashioned, continental-style approach to international dispute resolution, and towards the *Americanization* of adjudicatory mechanisms”).

These questions raise issues that are central to the Americanization debate. Due to arbitration's relatively confidential nature, answering the questions is not a simple task.<sup>7</sup> Certain arbitration practices or rules evidence some Americanization.<sup>8</sup> At a minimum, the practices or rules mark a change from the traditional "Europeanized forms of practice."<sup>9</sup> The claim of the Americanization of international arbitration, however, is based largely on anecdotal evidence.<sup>10</sup>

Given the difficulty in defining Americanization and in learning the truth about events transpiring behind a tribunal's closed doors, a fresh look at whether international arbitration has become Americanized is in order. This Article proposes three degrees of Americanization depending on the arbitration process. It also describes a concept of Americanization that goes beyond process by addressing the decisions of tribunals.

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<sup>7</sup> See Drahozal, *supra* note 1, at 108 (referring to international commercial arbitration's confidentiality and the lack of data about compliance with the arbitral rules). *But see* Michael D. Goldhaber, *Arbitration Scorecard: Private Practices*, FOCUS EUROPE, Summer 2003, at 16 [hereinafter Goldhaber, *Private Practices*] (claiming that international arbitration can no longer remain secret given the disputes' economic importance); *see also* Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 1012–13 (2001) (discussing the difficulty of maintaining the confidentiality of certain aspects of international arbitration, including the award); Michael D. Goldhaber, *Arbitration Scorecard: Big Arbitrations*, FOCUS EUROPE, Summer 2003, at 22–36 (identifying forty arbitrations with ties to Europe involving more than \$200 million; the analysis describes each dispute and the result of the arbitration, if available, and identifies counsel and the arbitrators); *Final Award in the Arbitration of Andersen v. Andersen*, 10 AM. REV. INT'L ARB. 451 (1999) (publishing the arbitral award arising from *Arthur Andersen Consulting Bus. Unit Member Firms v. Arthur Andersen Bus. Unit Member Firms and Andersen Worldwide Société Cooperative*).

<sup>8</sup> Reed & Sutcliffe, *supra* note 1, at 39–42 (stating that "[d]ocument production as ordered in international arbitration now tends to encompass documents, or categories of documents, that can be identified with reasonable specificity and that are relevant" and citing the new IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which allow limited document discovery and cross-examination of witnesses after they have produced a witness statement, all subject to the control of the arbitrators).

<sup>9</sup> Rau & Sherman, *supra* note 5, at 93.

<sup>10</sup> *See, e.g.*, DEZALAY & GARTH, *supra* note 1, at 9 (relying principally on interviews of "leading members of the international arbitration community and the representatives of the leading institutions"; also the authors attended conferences and "scanned the massive literature on this subject"); *see also* Ulmer, *supra* note 3, at 24–25 (assessing the charge of "Americanization" based on his personal experiences as a U.S.-trained lawyer who handles international arbitrations, and on comments made by others).

After the concept of Americanization is crystallized, the Article puts the principles to the practical test. In recent years, the number of arbitrations of investment disputes before the International Centre for the Settlement of Investment Disputes (ICSID) has increased substantially.<sup>11</sup> ICSID, an “autonomous international organization” with “close links to the World Bank,”<sup>12</sup> provides facilities for the arbitration of investment disputes between State parties to the International Convention on the Settlement of Investment Disputes and nationals of other State parties to the ICSID Convention.<sup>13</sup> ICSID’s headquarters are in Washington, D.C.<sup>14</sup> More than 1,000 bilateral investment treaties provide for arbitration of disputes “between a State party to the [ICSID Convention] and nationals of the other State party” through the ICSID Convention.<sup>15</sup> In addition, municipal law may require arbitration of certain disputes and specify arbitration under the ICSID Convention as an appropriate option.<sup>16</sup>

ICSID also offers Additional Facility Rules (AFRs), under which the ICSID Secretariat administers proceedings between States and foreign nationals that the ICSID Convention does not cover.<sup>17</sup> The growing number of investor-state arbitrations under Chapter 11 of the North American Free Trade Agreement (NAFTA) has corresponded with an increased number of ICSID arbitrations under the AFRs.<sup>18</sup>

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<sup>11</sup> See ABOUT ICSID, available at <http://www.worldbank.org/icsid/about/main.htm> (last visited Oct. 1, 2003), at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Mar. 18, 1965, ch. 1, § 1, arts. 1, 2, 17 U.S.T. 1270, 1273, 575 U.N.T.S. 159, 162 [hereinafter ICSID Convention]. For an introduction to arbitration under the ICSID Convention, see generally Abby Cohen Smutny, *Arbitration Before the International Centre for Settlement of Investment Disputes*, 3 BUS. LAW INT’L 367 (2002). Arguably, due to the presence of a sovereign nation as a party, ICSID arbitrations afford greater party autonomy and control than other international arbitrations. See Rogers, *supra* note 5, at 420–21.

<sup>14</sup> ABOUT ICSID, *supra* note 11, at 2.

<sup>15</sup> See Ibrahim F.I. Shihata, *Foreword* to CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, at xv (2001).

<sup>16</sup> See, e.g., 22 U.S.C. § 2370a (2000) (refusing U.S. foreign aid to a country that has expropriated the property of a U.S. citizen where the country has not returned the property or offered compensation or a domestic remedy or arbitration under the ICSID Convention or other agreeable international arbitration procedure).

<sup>17</sup> See ABOUT ICSID, *supra* note 11, at 2.

<sup>18</sup> North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 11, 32 I.L.M. 605, 639–49 [hereinafter NAFTA]. Under Chapter 11, Section B, investment disputes between a State party and an investor of another party that arise under Chapter 11, Section A should be arbitrated. Arbitration could be pursued under (a) the ICSID

The significance of ICSID arbitrations cannot be overstated. First, a non-judicial forum, not a national court, resolves substantial international investment disputes stemming from State conduct. With ICSID arbitrations, “we are walking with giant steps towards a general system of compulsory arbitration against States for all matters relating to international investments, at the initiative of the private actors of international economic relations.”<sup>19</sup> Second, the ICSID system reaches beyond mere dispute resolution. ICSID tribunals are frequently interpreting and clarifying international investment law and other aspects of international law.

While many ICSID arbitrations are confidential, aspects of certain ICSID proceedings are public. The ICSID website publishes many ICSID awards and other submissions in ICSID arbitrations.<sup>20</sup> Many ICSID awards appear in *ICSID Review—Foreign Investment Law Journal*, *International Legal Materials*, or *ICSID Reports*. The U.S. Department of State’s website contains transcripts of some ICSID hearings as well as some party submissions.<sup>21</sup> The information is a treasure trove for those curious about the otherwise secret world of international arbitration.

## II. AMERICANIZATION EXAMINED

International commercial arbitration has assumed some qualities of the U.S. adversarial system. This development, however, is not remarkable.

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Convention, if “both the disputing Party and the Party of the investor are parties to the [ICSID] Convention;” (b) ICSID’s AFRs, if “either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules.” *Id.* art. 1120(1). Mexico and Canada are not parties to the ICSID Convention while the United States is a party. *See Scorecard of Adherence to Transnational Arbitration Treaties*, NEWS AND NOTES FROM THE INST. FOR TRANSN’L ARB. (Center for Am. & Int’l Law) Spring 2003, at 7–10. Thus, the AFRs apply to NAFTA Chapter 11 arbitrations in ICSID.

<sup>19</sup> Elihu Lauterpacht, *Foreword* to CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, at xii (quoting Brigitte Stern, Presentation at the International Law Association Conference (July 2000)).

<sup>20</sup> *See also* Goldhaber, *Private Practices*, *supra* note 7, at 19 (observing that due to “outside pressure, the U.S. Department of State has made all NAFTA briefs public”).

<sup>21</sup> *See, e.g.*, *ADF Group Inc. v. United States*, ICSID Case No. ARB (AF)/00/1 (Apr. 15–18, 2002) (Transcripts of Hearing on Competence and Liability), *available at* <http://www.state.gov/s/l/c3754.htm> (last visited Oct. 1, 2003); *Mondev Int’l, Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, 42 I.L.M. 85 (May 20–24, 2002) (Transcripts of Hearing on Competence and Liability), *available at* <http://www.state.gov/s/l/c3758.htm> (last visited Oct. 1, 2003). The Trade Act of 2002 sets forth “principal trade negotiating objectives” which include transparency in the dispute settlement process. 19 U.S.C.A. § 3802(b)(3)(H) (2000 & Supp. 2003).

Many global law firms have home offices in the United States or other common law countries. These law firms are involved in all aspects of the international arbitration process, whether by drafting the arbitration clauses or acting as counsel to a party in a proceeding. Some arbitrators have received legal training in the United States or they may be or have been affiliated with a U.S. law firm. The arbitration centers, although located in various countries, no doubt employ lawyers trained in the adversarial system. The presence of U.S.-trained lawyers is shaping international commercial arbitration as participants “all carry the bag and baggage of our national litigation systems into the international arbitration room.”<sup>22</sup>

### *A. The Arbitration Process: Three Forms of Americanization*

Americanization is best understood in terms of the process of dispute resolution. This section proposes three forms of Americanization—mild, moderate, and extreme. It outlines each form and identifies practices that fit within each form.

#### *1. The Mild Form: Cross-Examination, Document Production, and Party Witnesses*

Americanization could be considered as the absorption of basic aspects of the U.S. adversarial system into international arbitration. Three essential features of the U.S. system are (a) counsel’s cross-examination of witnesses; (b) discovery of the parties’ documents; and (c) the use of parties, or their representatives, as witnesses. Arguably, the infusion of these three elements could be considered a major, rather than a mild, change. International arbitration has been traditionally based on the European civil law practice, which shuns cross-examination, discovery, and witness testimony from a party or its representative. Nevertheless, these practices are at the heart of the U.S. adversarial system; without them, no dispute resolution process could be considered even remotely Americanized.

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<sup>22</sup> Marriott, *supra* note 1, at 80; see also Charles N. Brower et al., *The Coming Crisis in the Global Adjudication System* 4–5 (2002), at [http://www.cailaw.org/ital/workshop02\\_brower.pdf](http://www.cailaw.org/ital/workshop02_brower.pdf) (recognizing that international arbitration “has grown and become increasingly the substitute for national court litigation” and “it inevitably has taken on ever more manifestly many of the characteristics of litigation, such as jurisdictional battles, evident tactical maneuvering, fights over disclosure and discovery, challenges to arbitrators and other preliminary phases and proceedings”); Ulmer, *supra* note 3, at 24 (noting that “many U.S. practitioners have succeeded in bringing some of the best aspects of U.S. legal rigor to the successful prosecution and defense of arbitration”).

### a. *Cross-Examination*

In the U.S. adversarial system, a party conducts a direct examination of the witness. Immediately thereafter, the other party cross-examines the witness. Cross-examination is not unique to the United States; it is “the policy of the Anglo-American system of evidence” and considered “a vital feature of the law.”<sup>23</sup> Cross-examination assumes the witness is present at an oral hearing, which itself is significant. Based on civil law tradition, evidence and argument in international arbitrations were principally presented in writing.<sup>24</sup> Today, evidence and argument are increasingly presented at oral hearings.<sup>25</sup> Cross-examination is heralded as “the greatest legal engine ever invented for the discovery of truth.”<sup>26</sup> It produces facts not disclosed in direct examination, which presumably the questioning lawyer did not elicit because they are harmful.<sup>27</sup> Cross-examination also allows the development of facts that could challenge the witness’s credibility.<sup>28</sup> In international arbitrations, “American and English advocates nearly always want to cross-examine witnesses” and possibly “attack their credibility or the quality of their recollections.”<sup>29</sup> Arbitrators from civil law countries find attacks on witnesses “embarrassing (if not barbaric)”<sup>30</sup> because in civil law systems, the tribunal “takes the lead in questioning the witnesses.”<sup>31</sup>

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<sup>23</sup> 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 1367 (Chadbourn rev. 1974).

<sup>24</sup> Rau & Sherman, *supra* note 5, at 91–92; *see also* Lawrence W. Newman, *International Arbitration Hearings: Showdown or Dénouement?*, 5 TUL. J. INT’L & COMP. L. 393, 395 (1997) (describing the limited role of a hearing in the Continental European system).

<sup>25</sup> ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 330 (3d ed. 1999) (noting that “the rules of the major international arbitration institutions provide for a hearing or hearings to take place at the request of either party, or at the instigation of the arbitral tribunal itself”); *id.* at 321 (stating that “it is usual for an arbitral tribunal to hear the evidence of witnesses at a formal hearing” unless the parties proceed solely on the documents); Rau & Sherman, *supra* note 5, at 91 (observing that “[t]he typical international arbitration, whether influenced by the civil law or common law tradition, is conducted in a formal, adversary hearing”).

<sup>26</sup> WIGMORE, *supra* note 23, § 1367.

<sup>27</sup> *Id.* § 1368.

<sup>28</sup> *Id.*

<sup>29</sup> REDFERN & HUNTER, *supra* note 25, at 335.

<sup>30</sup> *Id.* Compare Ulmer, *supra* note 3, at 25 (noting that “civil law lawyers will use techniques of common law origin if they feel that is in the interest of their client, and vice

Professor Andreas Lowenfeld, a noted U.S. arbitrator and legal scholar, has observed that cross-examination is gaining acceptance in international arbitration.<sup>32</sup> According to Lowenfeld, Continental lawyers are learning how to cross-examine and “arbitrators have learned how to administer cross-examination: letting counsel do the questioning does not mean losing control over the proceedings or tolerating abusive behavior.”<sup>33</sup> The commentators have described the examination of witnesses in international arbitration as a “blending” of the common and civil law practices in which counsel is allowed limited questioning under the control of the arbitrators without strict regard to the order of the questioning.<sup>34</sup> Either the rules under which the parties agreed to arbitrate allow for counsels’ questioning of witnesses,<sup>35</sup> or the tribunal authorizes counsel to ask questions.<sup>36</sup>

### b. Document Production

In the U.S. adversarial system, parties are given access to each other’s non-privileged documents that are relevant to a claim or defense in the case. Discovery, including relatively liberal document access, allows the parties

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versa”) with DEZALAY & GARTH, *supra* note 1, at 111 (quoting a French lawyer who admires cross-examination “because it is ‘so cruel’”).

<sup>31</sup> Rau & Sherman, *supra* note 5, at 92 n.12 (quoting Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. Y.B. INT’L LEGAL STUD. 163, 166 (1985)); Reed & Sutcliffe, *supra* note 1, at 41 (“[c]ross-examination is alien to the civil law tradition”).

<sup>32</sup> Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 654 (1997).

<sup>33</sup> *Id.*; see also Reed & Sutcliffe, *supra* note 1, at 38 (observing that U.S. lawyers have “added a necessary edge to international arbitration—most especially the ability of skilled cross-examination to reveal the truth”).

<sup>34</sup> Kathleen Paisley, Report, *Commencement of the Arbitration and Conduct of the Arbitration: Articles 6 to 13, Articles 37 and 38, Articles 41 to 45, Articles 47 to 51, Articles 53 to 58*, 9 AM. REV. INT’L ARB. 107, 145 (1998) (noting “the blending of the common and civil-law traditions” under the arbitration rules of the World Intellectual Property Organization (WIPO), as the parties, subject to the tribunal’s control, are authorized to question witnesses as is the tribunal); Rau & Sherman, *supra* note 5, at 101 (observing that in international arbitration, direct and cross-examination can be intertwined as the lawyers tend to ask questions without regard to formality).

<sup>35</sup> Paisley, *supra* note 34, at 144–45 (summarizing article 54 of the WIPO Arbitration Rules and article 20 of the Arbitration Rules of the London Court of International Arbitration).

<sup>36</sup> *Id.*



“to narrow and clarify the basic issues” in dispute and permits the unraveling of facts related to the issues.<sup>37</sup>

The U.S. Federal Rules of Civil Procedure (Federal Rules) authorize the discovery of another party’s documents. Contrary to popular belief, the Federal Rules do not tolerate “fishing expeditions” for documents irrelevant to the dispute.<sup>38</sup> The threshold for discovery, including the production of documents, is whether the requested matter, not privileged, “is relevant to the claim or defense of any party.”<sup>39</sup> The relevant information need not be admissible at trial so long as the “discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>40</sup>

In a lawsuit’s early stages, each party must make an initial disclosure, which requires the production of “a copy of, or a description by category and location of, all documents” that the disclosing party may use to support a claim or defense.<sup>41</sup> The initial disclosure must also reveal documents relevant to any damages calculation and any insurance agreement that would cover the judgment.<sup>42</sup> Second, under Rule 34, a party can submit a request for production of documents to the opposing party.<sup>43</sup> A general or broadly-worded request is unacceptable. The request must identify, “with reasonable particularity,” the requested document or category of documents.<sup>44</sup> Third, a party can cause the issuance of a subpoena *duces tecum* requesting that a non-party produce documents under Rule 34.<sup>45</sup> Under the Federal Rules, a party or person from whom discovery is sought can resist abusive discovery.

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<sup>37</sup> *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (describing the purpose of discovery as authorized under the Federal Rules of Civil Procedure).

<sup>38</sup> *See, e.g., White v. Money Store*, 1997 U.S. Dist. LEXIS 3042, at \*13 (N.D. Ill. Mar. 18, 1997) (denying motion to compel documents on the grounds that the plaintiff was on a fishing expedition); *United States ex rel. Stephens v. Prabhu*, 163 F.R.D. 340, 343 (D. Nev. 1995). *But see Reed & Sutcliffe, supra* note 1, at 39 (stating that “[t]he wide net and prohibitive expense of U.S. discovery ‘fishing expeditions’ attract substantial criticism”); Robert B. von Mehren, *An International Arbitrator’s Point of View*, 10 AM. REV. INT’L ARB. 203, 204 (1999) (in civil law jurisdictions “fishing expeditions,” in pre-hearing development of evidence are unacceptable, which suggests that common law jurisdictions at least tolerate them).

<sup>39</sup> FED. R. CIV. P. 26(b)(1).

<sup>40</sup> FED. R. CIV. P. 26(b)(1).

<sup>41</sup> FED. R. CIV. P. 26(a)(1)(B). Documents used “solely for impeachment” are not subject to initial disclosure. *Id.*

<sup>42</sup> FED. R. CIV. P. 26(a)(1)(C), (D). (providing that the party is to make these documents available for inspection and copying under Rule 34).

<sup>43</sup> FED. R. CIV. P. 34(a).

<sup>44</sup> FED. R. CIV. P. 34(b).

<sup>45</sup> FED. R. CIV. P. 34(c); *see also* FED. R. CIV. P. 45.

A person can move for a protective order to prevent or limit discovery that is an "annoyance, embarrassment, oppression, or undue burden or expense."<sup>46</sup> A party can object to a Rule 34 request if the requested documents are not discoverable under Rule 26(b)(1).<sup>47</sup> Also, a court can limit discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient" or for other reasons.<sup>48</sup> The system encourages the parties to cooperate in discovery. They are to attempt to confer in good faith to resolve discovery disputes before bringing them to the court.<sup>49</sup>

In international arbitrations, it is "rare" for a party to obtain discovery from a non-party.<sup>50</sup> Hence, discovery from non-parties is not part of the mild form of Americanization. Nevertheless, parties are agreeing on an orderly process for the production of each other's relevant documents, in addition to the practice of the parties' exchanging documents they intend to present in the arbitration.<sup>51</sup> As an experienced U.S. arbitrator and advocate states, "practitioners of international arbitration today, whether they practice common law or civil law at home, must expect that some level of document production will be the norm, rather than the exception."<sup>52</sup>

### *c. Testimony from Party Witnesses*

In civil law systems, a party or a representative of a party (e.g., an officer, employee, or director) is not permitted to testify as a witness at a hearing.<sup>53</sup> In the U.S. system, as well as other common law systems, any witness can be heard on a factual matter. Arbitration rules now generally recognize the common law approach that a party-affiliated witness can testify.<sup>54</sup>

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<sup>46</sup> FED. R. CIV. P. 26(c) (providing that a motion for protective order can only be filed if it is "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties" to try to resolve their differences).

<sup>47</sup> FED. R. CIV. P. 34(b).

<sup>48</sup> FED. R. CIV. P. 26(b)(2).

<sup>49</sup> FED. R. CIV. P. 37(a)(2)(A).

<sup>50</sup> Lowenfeld, *supra* note 32, at 654.

<sup>51</sup> Rau & Sherman, *supra* note 5, at 103.

<sup>52</sup> Reed & Sutcliffe, *supra* note 1, at 40.

<sup>53</sup> *Id.* at 42; *see also* Paisley, *supra* note 34, at 147 (recognizing that in the civil law system, parties "cannot be treated as witnesses").

<sup>54</sup> Reed & Sutcliffe, *supra* note 1, at 42 (observing that "[i]t is now generally accepted in international arbitration that any person should be permitted to testify as a witness of fact"); *see also* Paisley, *supra* note 34, at 147 (quoting article 20.7 of the Arbitration Rules of the London Court of International Arbitration, which authorizes a

## 2. *The Moderate Form*

In a sense, other practices, which are completely permissible and accepted as standard conduct in U.S. courts, have become common in international commercial arbitration. The moderate acts include the use of depositions and the recognition and application of basic U.S. evidentiary principles and practices.

### a. *Limited depositions*

Parties to civil disputes in U.S. courts can take a pre-trial deposition through oral examination of any person, including non-parties.<sup>55</sup> The deposition procedure is subject to various rules, including the requirement that proper notice of the deposition be given to all parties.<sup>56</sup> Restrictions are placed on the person before whom the deposition can be taken,<sup>57</sup> the number of depositions a party can take<sup>58</sup> and the length of any single deposition.<sup>59</sup> As in all aspects of U.S. discovery, depositions must address relevant matters as set forth under Rule 26(b)(1). A pre-trial deposition serves multiple purposes. It allows a party to learn about the witness's account of the events. A deposition prevents surprise at trial and gives the parties a sense of the case for purposes of settlement evaluation. A party can also pin down the witness so that if the witness's trial testimony differs from the deposition testimony, the witness can be impeached. Further, a deposition preserves evidence. If

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party or a party's officer, employee or shareholder to testify); Reed & Sutcliffe, *supra* note 1, at 42 (citing IBA Rules art. 4.2, which allows a party and "its officers, employees and other representatives" as witnesses).

<sup>55</sup> FED. R. CIV. P. 30(a)(1) (providing that attendance at a deposition can be compelled by a subpoena issued under Federal Rule 45).

<sup>56</sup> FED. R. CIV. P. 30(b)(1) (setting forth the requirement of a written notice and specifying the notice requirements); *see also* FED. R. CIV. P. 30 (b)(2) (specifying other requirements of the notice).

<sup>57</sup> FED. R. CIV. P. 30(b)(4) (providing that, absent the parties' agreement, a deposition can "only be conducted before an officer appointed or designated under [Federal] Rule 28"). In domestic depositions, the officer must have authority to "administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending." FED. R. CIV. P. 28(a). For a deposition taken in a foreign country, other requirements apply. *See* FED. R. CIV. P. 28(b).

<sup>58</sup> FED. R. CIV. P. 30(a)(2)(A) (providing that, absent leave of court, a party can only take ten depositions).

<sup>59</sup> FED. R. CIV. P. 30(d)(2) (providing that, unless otherwise ordered or agreed upon by the parties, a deposition is limited to one, seven-hour day).

the witness is not available for trial, *e.g.*, the witness is incapacitated or not within the court's subpoena power, the deposition could be used at trial.

Depositions remain uncommon in international commercial arbitrations,<sup>60</sup> but when they are used, it is principally based on the parties' agreement. Under some arbitral rules, the tribunal can ask for testimony it considers necessary. Depositions of non-parties to be used in international arbitrations pose unique problems. United States federal courts are not authorized to enforce subpoenas seeking pre-arbitration discovery for use in a private international commercial arbitration. While U.S. district courts can order testimony "for use in a proceeding in a foreign or international tribunal,"<sup>61</sup> the Fifth Circuit Court of Appeals has refused to allow judicial intervention in an international arbitration to order the deposition of non-parties.<sup>62</sup>

#### *b. Application of Other U.S. Evidentiary Principles and Practices*

The Federal Rules of Evidence apply to civil proceedings in U.S. courts.<sup>63</sup> While the rules are to be "construed to secure fairness" so that "the truth may be ascertained and proceedings justly determined,"<sup>64</sup> they nevertheless establish specific guidelines as to what can and cannot be admitted in a civil proceeding. The Federal Rules of Evidence also impose obligations on parties to object or move to strike evidence that is inadmissible and to obtain a ruling on the objection or motion.<sup>65</sup> The rules are critical to the U.S. adversarial process because they determine the facts that will be presented to the trier-of-fact (in many cases, a jury). As a result, lawyers appearing in U.S. courts spend considerable energy and time determining the evidence needed to prove a claim or defense and assuring its admission before the court. Likewise, through objections, they seek to

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<sup>60</sup> Rau & Sherman, *supra* note 5, at 103 (stating that "[d]epositions of witness are foreign to international arbitration" except to "preserve the testimony of a witness who may be ill or unavailable").

<sup>61</sup> 28 U.S.C. § 1782 (2000).

<sup>62</sup> See *Rep. of Kazakhstan v. Biedermann, Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (reversing lower court's order that a non-party submit to a deposition and produce certain documents to be used in a private international arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce); see also *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (affirming district court's quashing of subpoenas and denying a motion to enforce subpoenas directed at third-party financial institutions). The discovery was sought for use in an arbitration in Mexico under the auspices of the International Chamber of Commerce. *Id.*

<sup>63</sup> FED. R. EVID. 101.

<sup>64</sup> FED. R. EVID. 102.

<sup>65</sup> FED. R. EVID. 103(a)(1).

prevent the opposing side's use of inadmissible evidence. The court, in turn, makes frequent rulings on admissibility based on the Federal Rules of Evidence.

International commercial arbitrations, however, are not governed by "hard and fast rules" concerning "the character or weight of evidence."<sup>66</sup> Instead, without strict guidance from arbitration rules, arbitrators tend to "admit virtually any evidence" and thus consider the evidence's "relevance, credibility, and weight" in their deliberations.<sup>67</sup> Efforts to establish basic evidentiary rules have not resulted in principles applicable to all international arbitrations.<sup>68</sup>

An Americanized approach to the treatment of evidence in international commercial arbitrations would involve more than having specific guidelines as to the admissibility of evidence. It would also set forth a procedure for the Tribunal to rule on the admissibility of evidence and identify the actions a party must take to admit or exclude evidence.

### 3. *The Extreme Form*

Two types of conduct fit within the extreme form of Americanization. First, international commercial arbitration can assume qualities that have become associated, *de facto*, with the U.S. adversarial system. The Federal Rules of Civil Procedure and other laws may restrain or, in fact, prohibit these acts. Hence, it is improper to characterize some of the extreme conduct as "American" when U.S. law actually disallows it. Second, the U.S. legal system permits, but does not favor, certain acts. These acts lead to collateral matters that detract from the dispute's merits and cause delay. These acts, while permissible, should only be taken after careful study and only if absolutely necessary. The extreme acts, described below, are the type of "dyed-in-the-wool, hard-edge, brass knuckles" tactics that, rightly or wrongly, have become identified with the American process of dispute resolution.<sup>69</sup>

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<sup>66</sup> Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47, 47 (1994).

<sup>67</sup> *Id.* at 48; see also Rau & Sherman, *supra* note 5, at 95–96 (describing the arbitrators' practice of admitting most evidence and later evaluating its "relevance, credibility, and weight" and noting that American arbitrators engage in this practice too).

<sup>68</sup> Brower, *supra* note 66, at 48–49 (describing the evidence rules in the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)).

<sup>69</sup> Reed & Sutcliffe, *supra* note 1, at 38 (quoting DEZALAY & GARTH, *supra* note 1, at 52); see also Ulmer, *supra* note 3, at 24.

*a. Limited or Prohibited Conduct*

The first category of extreme acts, which U.S. law either attempts to constrain or prohibit, includes untimely disclosure of relevant documents or late submissions and the parties' repeated demands on the tribunal to resolve discovery or other pre-arbitration disputes.

U.S. litigation, including pre-trial discovery, is structured to minimize the burden on U.S. courts and to eliminate surprise and last-minute filings. Early in the lawsuit, the parties are to confer to consider claims, defenses, and settlement possibilities; to arrange for initial disclosures; and, in good faith, to develop a discovery plan.<sup>70</sup> The parties submit a report to the court that outlines the discovery plan.<sup>71</sup> The court may order a pretrial conference to expedite the case's disposition.<sup>72</sup> Under Rule 16, the court is to issue a scheduling order that sets forth dates for discovery completion.<sup>73</sup> The Rule 16 scheduling order or the court's local rules may set forth deadlines for the identification of witnesses and documents to be used at trial<sup>74</sup> and for the filing of motions. Except in limited circumstances, the U.S. system does not tolerate disclosure of documents or witnesses or the filing of certain motions on the eve of trial or beyond the court-ordered deadline. The disclosure of the identification of expert witnesses, including the submission of expert reports, is also highly structured. All disclosures must be made well in advance of trial.<sup>75</sup>

Likewise, the Federal Rules require that the parties, in good faith, try to resolve their differences about discovery before raising the dispute in court.<sup>76</sup>

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<sup>70</sup> FED. R. CIV. P. 26(f).

<sup>71</sup> FED. R. CIV. P. 26(f).

<sup>72</sup> FED. R. CIV. P. 16(a). For the subjects a court can address at a pretrial conference, see FED. R. CIV. P. 16(c). There may be multiple pretrial conferences. Shortly before the trial, a final pretrial conference will be held. FED. R. CIV. P. 16(d). The parties jointly submit a pretrial order, which "shall control the subsequent course of the action." FED. R. CIV. P. 16(e). The joint pretrial order includes stipulated facts, a statement regarding the status of settlement, exhibit lists, witness lists, deposition designations to be used at trial, and other matters.

<sup>73</sup> FED. R. CIV. P. 16(e).

<sup>74</sup> See also FED. R. CIV. P. 26(a)(3)(A)–(C) (providing that, at least 30 days before trial, unless otherwise ordered, the parties are to submit the names of witnesses and witness contact information and designate deposition testimony and documents to be used at trial).

<sup>75</sup> FED. R. CIV. P. 26(a)(2)(A)–(C).

<sup>76</sup> See, e.g., FED. R. CIV. P. 26(c) (requiring a party to confer in good faith with the opposing party before filing a motion for protective order); FED. R. CIV. P. 37(a)(2) (A)–(B) (requiring a party to confer in good faith with the opposing party before filing a

### b. *Less Than Desirable Conduct*

In the second category of extreme acts are permissible acts that are generally disfavored. For example, under Federal Rule 11, the court may sanction an attorney, law firm, or party who has made a false representation to the court.<sup>77</sup> The Federal Rules authorize sanctions in other stages of a legal proceeding, *e.g.*, relating to abusive discovery tactics.<sup>78</sup> A motion for sanctions may become necessary, and it is clearly permissible. Nevertheless, when sanctions are used repeatedly or used to try to gain leverage or curry favor with the court, they lose their intended effect and are undesirable.

Some U.S. lawyers, in pursuit of the zealous representation of their clients, may be reluctant to cooperate with opposing counsel. Similarly, because under the U.S. system a party is usually required to object to preserve error as to inadmissible evidence,<sup>79</sup> some lawyers object at every juncture. Other lawyers, however, may use objections sparingly. In the extreme form of Americanization, a party's aggressiveness is evidenced, for example, by a lack of cooperation with opposing counsel and frequent objections.

### B. *The Arbitral Award and Americanization*

In analyzing the Americanization of international commercial arbitration, commentators have principally focused on process. Little consideration has been given to the arbitral award itself.<sup>80</sup> As more awards are published, it is evident that recent awards cite to earlier awards, signaling that "arbitral awards have now become a private source carrying considerable weight and

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motion to compel disclosure or any other motion relating to the party's failure to comply with a discovery obligation).

<sup>77</sup> FED. R. CIV. P. 11(b), (c).

<sup>78</sup> FED. R. CIV. P. 26(g)(3).

<sup>79</sup> See FED. R. EVID. 103.

<sup>80</sup> Awards have been studied for other reasons. See, *e.g.*, Drahozal, *supra* note 1, at 121–33 (considering awards for the purpose of determining whether arbitrators apply commercial norms to international disputes); Rogers, *supra* note 5, at 350–51 (observing that, until recently, arbitral decisions "were not revered so much for their legal accuracy or precision as much as for their sense of fairness and practical wisdom"); *id.* at 416 (recognizing a "new-found interest in reasoned and published arbitral awards" that are subject to public scrutiny).

have undoubtedly helped to create the arbitral component of *lex mercatoria*.”<sup>81</sup>

While an analysis of what makes an arbitral award “American” would require a lengthy review of the role of precedent in the U.S. legal system, two observations can help shape the discussion. First, an award has some American qualities if it cites to and relies on legal principles set forth in other arbitral awards or the decisions of courts or international tribunals. Second, an award that does not repeat in detail each point made in every submission but instead gives a factual statement, based on the evidence presented, and then applies the law to the facts has assumed American qualities.

## II. ICSID ARBITRATIONS: LIMITED AMERICANIZATION

With the concept of Americanization better defined, the claim that international commercial arbitration has become Americanized can be tested. The analysis focuses on ICSID arbitrations concluded between January 1, 1998 and June 1, 2003, in which information about the case has been made public.<sup>82</sup>

### A. Preliminary Observations

From January 1, 1998 to June 1, 2003, numerous ICSID cases were concluded.<sup>83</sup> The author located published decisions in twenty-two of the concluded cases.<sup>84</sup> Two of the published decisions are in Spanish.<sup>85</sup> Two of the twenty-two cases involve published awards that embody the parties’ settlement agreement and therefore lack substantial legal analysis.<sup>86</sup> Hence,

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<sup>81</sup> Brown, *supra* note 7, at 1013 (quoting PHILIPPE FOUCHARD ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 189 (Emmanuel Gaillard & John Savage eds., 1999)).

<sup>82</sup> If the arbitral decision is unclear or silent on certain facts, the author did not speculate as to what happened. Given confidentiality and professional concerns, the author did not discuss the details of what actually happened with the attorneys who appeared in the arbitration.

<sup>83</sup> See generally ICSID List of Concluded Cases at <http://www.worldbank.org/icsid/cases/conclude.htm> (last visited Sept. 29, 2003) [hereinafter ICSID Concluded Cases].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 31 (referring to *Olguín v. Paraguay*, ICSID Case No. ARB/98/5 (2001); *id.* at 37 (referring to *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2 (2003)).

<sup>86</sup> *Id.* at 21–22 (referring to *Goetz v. Burundi*, ICSID Case No. ARB/95/3 (1999) (award embodying the parties’ settlement agreement is in French); *id.* at 28 (referring to *Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1 (2000)).



this study addresses published awards, submissions, and hearing transcripts in eighteen ICSID cases.<sup>87</sup>

The eighteen ICSID cases adopted a uniform approach to basic procedural issues. After the arbitrators were selected, the Tribunal held an initial meeting to establish procedures.<sup>88</sup> The first sessions did not address precisely the same issues. Matters addressed include: (a) confirmation that

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<sup>87</sup> The eighteen cases are: ADF Group Inc. v. United States, Award, ICSID Case No. ARB(AF)/00/1 (2003), at [www.state.gov/documents/organization/16586.pdf](http://www.state.gov/documents/organization/16586.pdf) [hereinafter ADF, Award]; Mondev Int'l Ltd. v. United States, Award, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85 (2003) [hereinafter Mondev, Award]; Banro American Res., Inc. v. Congo, Award, ICSID Case No. ARB/98/7, 17 ICSID REV.-FOREIGN INVESTMENT L.J. 382 (2000); Compañía de Aguas del Aconquija S.A. v. Argentina, Award, ICSID Case No. ARB/97/3, 40 I.L.M. 426 (2000) [hereinafter Compañía, Award]; Genin v. Rep. of Estonia, Award, ICSID Case No. ARB/99/2, 17 ICSID REV.-FOREIGN INVESTMENT L. J. 395 (2002) [hereinafter Genin, Award]; Gruslin v. Malaysia, Award, ICSID Case No. ARB/94/1, 5 ICSID REP. 483 (2002) [hereinafter Gruslin, Award]; Middle East Cement Shipping & Handling Co. v. Egypt, Award, ICSID Case No. ARB/99/6 (2002), at [www.worldbank.org/icsid/cases/me\\_cement-award.pdf](http://www.worldbank.org/icsid/cases/me_cement-award.pdf) [hereinafter Middle East, Award]; Mihaly Int'l Corp. v. Sri Lanka, Award, ICSID Case No. ARB/00/2, 41 I.L.M. 867 (2002) [hereinafter Mihaly, Award]; Wena Hotels Ltd. v. Egypt, Award, ICSID Case No. ARB/98/4, 41 I.L.M. 896 (2002) [hereinafter Wena, Award]; Lanco Int'l Inc. v. Argentine Rep., Preliminary Decision on Jurisdiction, ICSID Case No. ARB/97/6, 40 I.L.M. 457 (2001) [hereinafter Lanco, Jurisdictional Decision]; Maffezini v. Spain, Award, ICSID Case No. ARB/97/7, 40 I.L.M. 1148 (2001) [hereinafter Maffezini, Award]; Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1, 40 I.L.M. 36 (2001) [hereinafter Metalclad, Award]; Waste Mgmt., Inc. v. Mexico, Award, ICSID Case No. ARB(AF)/98/2, 40 I.L.M. 56 (2001) [hereinafter Waste Mgmt., Award]; Azinian v. Mexico, Award, ICSID Case No. ARB(AF)/97/2, 39 I.L.M. 537 (2000) [hereinafter Azinian, Award]; Compañía del Desarrollo de Santa Elena, SA. v. Costa Rica, Award, ICSID Case No. ARB/96/1, 39 I.L.M. 1317 (2000) [hereinafter Santa Elena, Award]; Tradex Hellas S.A. v. Albania, Award, ICSID Case No. ARB/94/2, 14 ICSID REV.-FOREIGN INVESTMENT L.J. 197 (1999) [hereinafter Tradex, Award]; Fedax N.V. v. Venezuela, Award, ICSID Case No. ARB/96/2, 37 I.L.M. 1391 (1998) [hereinafter Fedax, Award]; Am. Mfg. & Trading, Inc. v. Zaire, Award, ICSID Case No. ARB/93/1, 36 I.L.M. 1531 (1997) [hereinafter Am. Mfg., Award].

<sup>88</sup> An initial meeting is required. See ICSID ARB. R. 13(1), in ICSID CONVENTION, REGULATIONS AND RULES 109 (2003) [hereinafter ICSID ARB. R.] (requiring the Tribunal to hold its first session within sixty days after its constitution or as the parties agree); ICSID ARB. (ADDITIONAL FACILITY) R. art. 21(1), in ICSID ADDITIONAL FACILITY RULES 56 (2003) [hereinafter ICSID AFR] (same). After the Tribunal is constituted, the President is to “ascertain the views of the parties regarding questions of procedure.” ICSID ARB. R. 20(1) (listing the items to be addressed in the preliminary procedural consultation); ICSID AFR art. 28 (same).

the Tribunal had been properly constituted;<sup>89</sup> (b) acknowledgement of the proceeding's official language;<sup>90</sup> (c) confirmation of the proceeding's location, if the parties had agreed on it;<sup>91</sup> (d) the schedule for written submissions on pending issues;<sup>92</sup> and (e) the date for oral hearings on pending issues.<sup>93</sup> The parties agreed on most procedural matters. The Tribunal's decisions were memorialized in written procedural orders.<sup>94</sup> In some cases, the respondent challenged jurisdiction or the panel's

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<sup>89</sup> See, e.g., *Mondev, Award, supra* note 87, ¶ 19; *Compañía, Award, supra* note 87, ¶ 11; *Genin, Award, supra* note 87, ¶ 20; *Maffezini, Award, supra* note 87, ¶ 14; *Fedax Award, supra* note 87, ¶ 8.

<sup>90</sup> See, e.g., *Compañía, Award, supra* note 87, ¶ 14; *Genin, Award, supra* note 87, ¶ 21; *Maffezini, Award, supra* note 87, ¶ 15; *Fedax, Award, supra* note 87, ¶ 10. The parties may agree on one or two languages. See ICSID ARB. R. 22(1); ICSID AFR art. 30(1).

<sup>91</sup> The parties have input into the selection of the arbitration site. ICSID ARB. R. 13(3) (stating that the Tribunal shall meet at ICSID's seat or any other place agreed by the parties under ICSID Convention art. 63); ICSID AFR art. 20(1) (indicating that, subject to article 19, the Tribunal shall determine the place of the arbitration after consulting with the parties and the ICSID Secretariat); ICSID AFR art. 19 (stating that "[a]rbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards"). In *ADF*, the claimant (a Canadian corporation) requested that arbitration occur in Montreal, Canada while the respondent (United States) argued for Washington, D.C. The Tribunal was asked to decide the issue based on the parties' written submissions. *ADF, Award, supra* note 87, ¶ 6. The Tribunal dismissed the claimant's argument that U.S. law was unclear, which could allow a challenge to the Tribunal's award in post-award litigation, and designated Washington, D.C. *Id.* ¶¶ 6–26; see also *Mondev, supra* note 87, ¶¶ 18, 19, 21, 22, 26. Claimant, a Canadian company, argued that the arbitration should take place in Canada to protect the proceeding's confidentiality and for neutrality reasons while respondent, United States, argued for arbitration in Washington, D.C.; the Tribunal, after "considering all relevant factors," selected Washington, D.C. *Id.*

<sup>92</sup> The written procedure consists of the submission of the memorial and counter-memorial; "and, if the parties so agree or the Tribunal deems it necessary" a reply and rejoinder. See ICSID ARB. R. 31(1); ICSID AFR art. 38. Supporting documentation "shall ordinarily be filed together with the instrument to which it relates." ICSID ARB. R. 24; ICSID AFR art. 32.

<sup>93</sup> See, e.g., *Genin, Award, supra* note 87, ¶ 24; *Waste Mgmt., Award, supra* note 87, § 3; *Santa Elena, Award, supra* note 87, ¶ 13; ICSID ARB. R. 13(2), (4) (authorizing the Tribunal to announce the dates of subsequent sessions after consulting with the ICSID Secretary-General and with the parties if possible); ICSID AFR art. 21(1), (3) (same); see also ICSID ARB. R. 32(1) (recognizing an oral procedure, in addition to a written procedure, which "shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts"); ICSID AFR art. 39 (same).

<sup>94</sup> ICSID ARB. R. 19; ICSID AFR art. 27.

competence.<sup>95</sup> A separate jurisdictional hearing was ordered and the proceeding on the merits abated.<sup>96</sup> This bifurcated approach is authorized under ICSID Arbitration Rule 41(3).<sup>97</sup> The jurisdictional issue was resolved at an oral hearing held after the parties made written submissions. In some cases, the jurisdictional issues and merits were intertwined so both issues were addressed together.<sup>98</sup>

If jurisdiction was recognized, then a schedule would be announced for the merits phase if one was not in place already. In addition to setting dates for the written and oral submissions, some Tribunals set deadlines on other procedural matters.<sup>99</sup>

ICSID's approach to case management bears only a slight resemblance to the U.S. approach. The initial meeting in ICSID proceedings has some

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<sup>95</sup> An objection based on lack of jurisdiction or competence of the Tribunal "shall be made as early as possible" and, in general, "no later than the expiration of the time limit fixed for the filing of the counter-memorial." ICSID ARB. R. 41(1).

<sup>96</sup> See, e.g., *Middle East, Award*, *supra* note 87; *Wena Hotels Ltd. v. Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/98/4, 41 I.L.M. 881 (2002); *Gruslin, Award*, *supra* note 87, ¶ 6.5; *Maffezini v. Spain*, Decision on Jurisdiction, ICSID Case No. ARB/97/9, 40 I.L.M. 1129 (2001); *Tradex Hellas S.A. v. Rep. of Albania*, Decision on Jurisdiction, No. ARB/94/2, 14 ICSID REV.-FOREIGN INVESTMENT L.J. 161, 164 (ICSID 1999); *Fedax N.V. v. Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/96/2, 37 I.L.M. 1378 (1998). In some cases, it is unclear if a stay was ordered although the merits were decided after the jurisdictional issue. See *Mihaly, Award*, *supra* note 87; *Waste Mgmt., Award*, *supra* note 87, § 3. Cf. *Lanco*, Decision on Jurisdiction, *supra* note 87, § 3 (both parties submitted memorials on merits and jurisdiction before the hearing on jurisdiction).

<sup>97</sup> ICSID ARB. R. 41(3); see also CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 540 (2001) (noting that "[a]n objection to jurisdiction over the dispute leads to the suspension of the proceeding on the merits . . . only if the objection relates to the primary dispute and not merely to an ancillary claim"). The AFRs recognize that an objection to the Tribunal's competence could be filed. ICSID AFR art. 45(1). The merits proceeding should be suspended upon the filing of an objection to competence relating to the dispute. *Id.* art. 45(4).

<sup>98</sup> See, e.g., *ADF, Award*, *supra* note 87, ¶ 41; *Compañía, Award*, *supra* note 87, ¶ 17; *Genin Award*, *supra* note 87, ¶¶ 25–27, 319–35 (after holding the hearing on jurisdiction, the Tribunal ordered that objections to jurisdiction would be heard with the merits).

<sup>99</sup> See, e.g., *Mondev, supra* note 87, ¶ 27; *Maffezini, Award, supra* note 87, ¶¶ 26–27 (indicating a deadline for the identification of witnesses whom a party would ask the Tribunal to call upon); *Azinian Award, supra* note 87, ¶ 68 (ordering list of witnesses and experts whom a party wished to examine be filed by a certain date); *Tradex, Award, supra* note 87, ¶¶ 18–29 (referring to various procedural orders). The applicable rules contemplate that the Tribunal will impose time limits on the marshalling of evidence. See ICSID ARB. R. 33; ICSID AFR art. 40.

features of a Federal Rule 16 conference, although the initial meetings place less emphasis on the issue that dominates the U.S. pre-trial process: discovery. Furthermore, the ICSID first session and the subsequent sessions do not address the panoply of other procedural, evidentiary, and substantive issues, including settlement, which U.S. courts typically address. No serious pre-hearing conference is held, similar to a U.S. pretrial conference. Thus, no effort is made to have the parties stipulate to uncontested facts as required under the Federal Rules, so that presentation of the case can be streamlined. ICSID's case management approach confirms the observation of Professors Rau and Sherman that the role of the arbitrator involves the "establish[ment of] schedules through procedural orders, but this role falls far short of what case management has come to mean in U.S. litigation."<sup>100</sup>

### *B. ICSID and the Three Forms of Americanization*

The mild, moderate, and extreme forms of Americanization appear in the ICSID arbitrations. The frequency of the mild aspects is substantial while the frequency of the moderate and extreme forms is low.

#### *1. Many Mild Aspects*

The three elements that reflect a mild sense of the Americanization are present in ICSID arbitrations.

##### *a. Cross-examination*

Cross-examination occurred in many cases involving a merits hearing.<sup>101</sup> The Tribunal also questioned the witnesses. The fact of cross-examination is not surprising. Cross-examination, under the control of the President of the Tribunal, is authorized as is the Tribunal's questioning of witnesses.<sup>102</sup> Full development of the evidence at an ICSID oral hearing has proven material.

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<sup>100</sup> Rau & Sherman, *supra* note 5, at 99.

<sup>101</sup> See, e.g., *Compañía, Award*, *supra* note 87, ¶¶ 20–21; *Genin, Award*, *supra* note 87, ¶¶ 239–311; *Maffezini Award*, *supra* note 87, ¶ 33; *Metalclad Award*, *supra* note 87, ¶ 25; *Azinian, Award*, *supra* note 87, ¶¶ 68–72; *Tradex, Award*, *supra* note 87, ¶ 33. In one case, Respondent's counsel failed to appear and thus Claimant's witnesses were not cross-examined. See *Am. Mfg., Award*, *supra* note 87, ¶¶ 3.22–3.24. In two cases, it was not clear if witnesses were presented. *Mondev, Award*, *supra* note 87; *Middle East, Award*, *supra* note 87, ¶¶ 60–61. In two other cases involving a hearing, the award does not indicate if the witnesses were cross-examined. See, e.g., *Wena, Award*, *supra* note 87; *Santa Elena, Award*, *supra* note 87.

<sup>102</sup> See ICSID ARB. R. 35(1); ICSID AFR art. 42.

One Tribunal found the claimant's principal witnesses not credible.<sup>103</sup> Another Tribunal learned critical facts only upon hearing the witness's testimony and his answers to "substantial questioning."<sup>104</sup> A third Tribunal discredited the claimant's position on an expropriation point by establishing that the witness never complained about the occupation in seven letters he wrote to the Albanian government and he could not testify consistently about when the occupation occurred.<sup>105</sup>

### b. *Document Production*

In addition to the documents a party files with its written submissions, ICSID rules authorize the Tribunal to request documents from any party. If the Tribunal "deems it necessary at any stage of the proceeding" it may "call upon the parties to produce documents or other evidence, witnesses and experts."<sup>106</sup> A party, in turn, can request the Tribunal to "call for" evidence.<sup>107</sup> While the ICSID approach does not give a party the right to obtain all relevant documents from another party, it can pave the way for an expansive approach to document production somewhat consistent with the U.S. approach.<sup>108</sup>

*ADF Group* illustrates that in ICSID arbitrations a party can obtain the other party's relevant documents. In *ADF Group*, the claimant filed a formal motion for production of documents with the Tribunal.<sup>109</sup> The categories of documents requested resembled a typical list of documents attached to a request for production of documents under U.S. Federal Rule of Civil Procedure 34 (Federal Rules). After the respondent submitted objections to the request, the Tribunal analyzed each of the categories of requested documents based on a relevancy standard. The relevancy analysis is

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<sup>103</sup> Azinian, Award, *supra* note 87, ¶ 123.

<sup>104</sup> Genin, Award, *supra* note 87, ¶ 352.

<sup>105</sup> Tradex, *supra* note 87, ¶¶ 160–61.

<sup>106</sup> ICSID ARB. R. 34(2)(a); ICSID AFR art. 41(2).

<sup>107</sup> See *supra* text accompanying note 99.

<sup>108</sup> But see Rau & Sherman, *supra* note 5, at 103 (distinguishing the "exchange of relevant documents" between parties and the arbitrator's ordering "discovery of critical documents" from "the much broader right under American discovery rules to require an opponent to make available documents and other information concerning relevant matters").

<sup>109</sup> See *ADF Group Inc. v. United States*, Procedural Order No. 3 concerning production of documents, ICSID Case No. ARB (AF)/00/1 (2001), at <http://www.state.gov/documents/organization/5963.pdf> [hereinafter *ADF*, Procedural Order].

consistent with the standard applicable under the Federal Rules.<sup>110</sup> The Tribunal also considered whether the presence of the documents in the public domain warranted the denial of the request. In tackling this issue, the Tribunal applied “the procedure and practice in the District of Columbia” and case law under Federal Rule 34, because the Tribunal was sitting in Washington, D.C.<sup>111</sup> Ultimately, the Tribunal adopted the U.S. practice of allowing the responding party to identify the specific government office where the documents would be produced.<sup>112</sup> In the process, the parties were able to reach substantial agreement on a number of requests, which typically occurs when parties in U.S. court disagree over document requests.<sup>113</sup>

The experience in *ADF Group* is similar to that in *Mondev*. The claimant submitted to the Tribunal a request for documents under AFR art. 41(2). The respondent, United States, agreed to produce some of the documents. It then filed objections, and ultimately agreed to produce more documents. At the end of the day, a substantial portion of the requested documents was produced.<sup>114</sup>

*Metalclad* evidences an even more liberal approach to documents. After numerous requests for the production of documents, the President of the Tribunal could not resolve the relevancy issue at the early stage.<sup>115</sup> He thus ordered the claimant to produce the documents, but held that the claimant could recover the costs of the production “should the requests be adjudged unreasonable or improper.”<sup>116</sup>

### c. Party Witnesses

The ICSID rules do not expressly bar a party or its representative from testifying before the Tribunal. Party-affiliated witnesses have testified in ICSID arbitrations.<sup>117</sup>

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<sup>110</sup> Compare *supra* text accompanying notes 38–40 with ADF, Procedural Order, *supra* note 109, ¶ 3.

<sup>111</sup> ADF, Procedural Order, *supra* note 109, ¶ 5.

<sup>112</sup> *Id.* ¶ 4.

<sup>113</sup> *Id.* ¶¶ 7–17.

<sup>114</sup> *Mondev Award*, *supra* note 87, ¶¶ 23–26 (observing that “Respondent had extensively complied with the Claimant’s request”).

<sup>115</sup> *Metalclad, Award*, *supra* note 87, ¶ 12.

<sup>116</sup> *Id.* The Tribunal did not make a finding that the requests were unreasonable or improper. *Id.*

<sup>117</sup> See, e.g., *Genin, Award*, *supra* note 87, ¶ 239 (claimant testified); *Maffezini, Award*, *supra* note 87, ¶¶ 26, 32. The Tribunal called on claimant to appear, and claimant appeared by “written deposition.” *Id.*; see also *Azinian, Award*, *supra* note 87, ¶ 72 (one

In sum, all three elements of the mild form of Americanization were present in some of the ICSID arbitrations.

## 2. *Limited Moderate Aspects*

Only limited moderate elements of Americanization, however, have appeared in ICSID arbitrations.

### a. *Depositions*

It appears that an American-style oral deposition was not used to present testimony in any of the eighteen cases.<sup>118</sup> An oral deposition based on the Tribunal's procedures, however, could be submitted if the parties agreed.<sup>119</sup>

Instead, Tribunals follow a pattern of having each party submit witness statements. Based on the statements, a party asks the Tribunal to "call upon" the other party to produce certain witnesses to present live testimony. Actually, it appears that in many cases the parties reach an agreement on who will attend and do not place a formal demand on the Tribunal. In any event, the Tribunal cannot compel a witness's presence.<sup>120</sup> If a witness could not attend the hearing, the parties in some cases agreed on a solution to allow the development of the evidence. For example, in *Azinian*, respondent Mexico agreed that certain of the claimant's witnesses could be excused from the hearing if they answered a limited list of admissions provided by respondent.<sup>121</sup> If no agreement could be reached, then the Tribunal would decide the consequences of the witness's absence. In *Tradex*, the Tribunal held that the claimant could not meet its burden of proof merely based on a

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of the claimants testified); *Santa Elena*, Award, *supra* note 87, ¶ 46 (identifying one of the respondent's witnesses as an official of Costa Rica).

<sup>118</sup> The Tribunal may "admit evidence given by a witness or expert in a written deposition." ICSID ARB. R. 36(a); ICSID AFR art. 43(a). In two proceedings, the Tribunal explicitly referred to testimony being presented by a "written deposition" although these references appear to refer to written statements. See Maffezini, Award, *supra* note 87, ¶¶ 29, 32; Am. Mfg., Award, *supra* note 87, ¶ 3.24.

The phrase "written deposition" has not been construed to mean an American oral deposition. See *Tradex*, Award, *supra* note 87, ¶¶ 79–80 (citing to ICSID ARB. R. 36(a) and noting it does not preclude the introduction of "non-sworn written witness statements").

<sup>119</sup> SCHREUER, *supra* note 97, at 658–59 (citing ICSID ARB. R. 36(b)); see also ICSID AFR art. 43(b). Under the rules, "the Tribunal shall outline the procedure to be followed." ICSID ARB. R. 36(b); ICSID AFR. art. 43(b).

<sup>120</sup> SCHREUER, *supra* note 97, at 658.

<sup>121</sup> *Azinian*, Award, *supra* note 87, ¶ 71.

witness's written statements, as when the witness was not present at the hearing and subject to cross-examination.<sup>122</sup>

### b. Evidence

Like many rules of international arbitrations, the ICSID rules lack detailed evidentiary standards. The guiding principle is as follows: "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."<sup>123</sup> This rule is being tested, because many witnesses are now appearing at the oral hearing, in which they are being cross-examined, and there is a growing likelihood that a party will have access to the other party's relevant documents. Despite these challenges, the parties and the Tribunals have not routinely resorted to basic U.S. evidentiary principles and practices. The available ICSID case materials lack detailed insight into what happens in the oral hearings. Hence, it is impossible to address whether evidentiary objections and Tribunal rulings on the objections are routine in ICSID hearings. The tenor of the decisions suggests they are not. Nevertheless, as noted above, Tribunals are addressing issues related to absent witnesses. They are also applying relevancy standards to the issue of documents a party should produce.

In at least one case, the Tribunal actually excluded evidence that arguably could have been relevant. This decision deviates from the traditional practice in arbitration of admitting the evidence and then addressing any objectionable aspects to the evidence in terms of its weight. In *Azinian*, the claimant submitted witness statements. The respondent then contacted the claimant-designated, non-party witnesses to interview them. Claimant claimed that the witness contact violated ICSID AFR article 43, which authorizes the Tribunal to arrange for a witness examination outside the Tribunal's presence.<sup>124</sup> The Tribunal refused to restrict a party from interviewing the witnesses, subject to certain conditions, but it held that "[s]tatements made by a witness during any such interview shall not be received into evidence" and the "only testimony to be given probative value is that contained in signed written statements or given orally in the presence" of the Tribunal.<sup>125</sup>

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<sup>122</sup> Tradex, Award, *supra* note 87, ¶¶ 184–85; see also, SCHREUER, *supra* note 97, at 659 (noting that in Tradex, the failure of a claimant's witness to appear amounted to the failure of the claimant to meet its burden of proof on the point in issue).

<sup>123</sup> ICSID ARB. R. 34(1); ICSID AFR art. 41(1).

<sup>124</sup> See *supra* note 119 (discussing ICSID ARB. R. 36(b); ICSID AFR art. 43(b)).

<sup>125</sup> Azinian, Award, *supra* note 87, ¶ 56. See *id.* ¶¶ 53–56 (discussing the Article 43 issue).



*Azinian* should be contrasted with the ruling in *Tradex*, in which the claimant vaguely alleged that the respondent had interfered with claimant's designated witnesses. The Tribunal refused to hold the evidence inadmissible, and instead stated that it "shall take into account the objections raised by the Parties insofar as the Tribunal considers that the evidence objected to is relevant for the award on the merits."<sup>126</sup>

Application of evidentiary principles in a U.S. fashion appears to occur but it is not common in ICSID arbitrations. The current system gives substantial authority to the Tribunal on evidentiary matters. The approach reduces the need for the Tribunal to make difficult evidentiary decisions. While the approach poses uncertainty to the parties, it enhances the likelihood that the Tribunal can hear all aspects of a case. Since the Tribunal is the decisionmaker in all respects, including as to evidentiary matters, the harm in having all of the evidence presented is not as great as if a jury were deciding the case.

### 3. *Some Extreme Aspects*

Conduct fitting the extreme form of Americanization has occurred in some of the ICSID proceedings. The conduct, however, is infrequent. Second, it appears that some of the conduct stemmed from unexpected events that occurred either before or during the oral hearing. While in the U.S. system full discovery minimizes surprise, in arbitrations surprise is perhaps more likely. Third, the Tribunals were able to exercise appropriate control to assure that any delay resulting from the conduct was minimized. Of note, none of the eighteen cases involved an extreme act that resulted in the collateral issue overwhelming the merits of the case.

#### a. *Limited or Prohibited Conduct*

In some of the ICSID cases, a party made late disclosures or submissions,<sup>127</sup> made multiple submissions to the Tribunals (which prompted multiple orders),<sup>128</sup> or sought to add evidence into the record after the

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<sup>126</sup> *Tradex*, Award, *supra* note 87, ¶ 83.

<sup>127</sup> *Metalclad*, Award, *supra* note 87, ¶¶ 15–16 (late filing of certain exhibits and translations); *Azinian*, Award, *supra* note 87, ¶¶ 65–66 (late submission of Spanish version of reply); *Santa Elena*, Award, *supra* note 87, ¶ 48 (adding four witness statements during the course of the hearing).

<sup>128</sup> *Santa Elena*, Award, *supra* note 87, ¶ 32 n.19 (noting that "throughout the written and oral phases of these proceedings, the Tribunal was called upon to deal with a

evidentiary hearing.<sup>129</sup> In most instances, the situations resolved themselves with minor disruption.<sup>130</sup>

In one of the eighteen cases, *Santa Elena*, which involved American lawyers as counsel, two actions were taken that have elements of “mild extremism.” First, after the claimant filed its memorial, the respondent moved for a partial award and also sought to preclude claimant from submitting any other evidence unless it was within the scope of a reply memorial.<sup>131</sup> After multiple submissions on the issue, the Tribunal issued a unanimous order denying respondent’s request.<sup>132</sup> Second, on the Friday before the merit’s hearing, respondent applied for provisional measures and for emergency interim restraining measures.<sup>133</sup> On Monday morning, the Tribunal dismissed respondent’s application.<sup>134</sup> When the application was filed, the *Santa Elena* matter had been registered with ICSID for nearly three years.<sup>135</sup>

#### b. *Less than Desirable Conduct*

The ICSID rules do not expressly authorize sanctions. Under the rules, however, the Tribunal can decide that, as to a certain part of the proceeding, one of the parties should bear the related arbitration costs.<sup>136</sup> As Schreuer observes, the imposition of a disproportionate share of costs could be “a sanction against what [the Tribunal] saw as dilatory or otherwise improper conduct.”<sup>137</sup> In *American Manufacturing*, for example, respondent Zaire did not have representation at the merits hearing nor did it take advantage of the Tribunal’s offer to attend a supplemental hearing.<sup>138</sup> The supplemental hearing was conditioned upon Zaire’s payment, up-front, of the fees and expenses of the arbitrators and the administrative fees related to the

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series of procedural applications at the behest of both parties” causing the Tribunal to issue “a number of procedural orders and many more decisions and directions”).

<sup>129</sup> Tradex, Award, *supra* note 87, ¶¶ 45–46.

<sup>130</sup> See *infra* notes 142–45 and accompanying text concerning Metalclad.

<sup>131</sup> Santa Elena, Award, *supra* note 87, ¶ 30.

<sup>132</sup> *Id.* ¶¶ 31–32.

<sup>133</sup> *Id.* ¶ 43.

<sup>134</sup> *Id.* ¶ 44.

<sup>135</sup> *Id.* ¶ 1, 4, 43.

<sup>136</sup> ICSID ARB. R. 28(1)(b).

<sup>137</sup> SCHREUER, *supra* note 97, at 1227.

<sup>138</sup> Am. Mfg., Award, *supra* note 87, ¶¶ 3.23–3.26.

hearing.<sup>139</sup> Regardless, the final award in favor of the claimant in *American Manufacturing* simply ordered the parties to share equally in all of the arbitration fees and expenses,<sup>140</sup> so Zaire was not “sanctioned” for its non-appearance.

Of note is that in only one of the eighteen cases was a motion for sanctions filed.<sup>141</sup> In this case, claimant Metalclad (a Delaware corporation) moved for sanctions against respondent Mexico due to its “untimely” filing of a counter-memorial and failure to submit translations by the due date.<sup>142</sup> Metalclad sought to have the counter-memorial and the documents struck from the record.<sup>143</sup> The motion prompted a flurry of written submissions.<sup>144</sup> In just over a month, the Tribunal put an end to the side-issue by denying the motion on the grounds that the result sought would have been “excessive under the circumstances,” and upon a finding that Metalclad was unable to establish any harm due to the delay.<sup>145</sup>

The public information in the eighteen cases evidences contentiousness between parties, which one would expect in disputes involving millions of dollars and when an investor is accusing a state of wrong-doing. Aside from the matters mentioned here, the author was unable to discern a heightened level of contentiousness. In fact, in many proceedings, it appears that counsel were able to reach agreement on multiple issues.

### C. ICSID Awards

The focus now shifts from the ICSID arbitration process to the Tribunal’s arbitral awards.<sup>146</sup> Two brief observations will be made. First, ICSID arbitral awards are increasingly citing to other ICSID awards and the decisions of other international tribunals.<sup>147</sup> The trend will probably

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<sup>139</sup> *Id.* ¶ 3.25.

<sup>140</sup> *Id.* ¶ 7.21.

<sup>141</sup> See Metalclad, Award, *supra* note 87, ¶ 16. The legal basis of the motion for sanctions was not specified.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> The section is brief as its intention is to introduce the concept. The author anticipates preparing a more substantial work on this aspect of the ICSID process.

<sup>147</sup> See, e.g., ADF, Award, *supra* note 87, ¶¶ 180–186 (relying on *Mondev* to support its interpretation of NAFTA art. 1105(1), which requires a NAFTA party to treat investors from another NAFTA country in accordance with international law, including

continue. For example, under NAFTA Chapter 11, a Tribunal “shall decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law” and is bound by “[a]n interpretation by the [Free Trade] Commission of a provision of [the NAFTA].”<sup>148</sup> The Free Trade Commission recently interpreted NAFTA article 1105(1) to mean that it “prescribes the customary international law standard of treatment of aliens as the minimum standard of treatment” for investors of another NAFTA party. The concepts of “fair and equitable treatment” and “full protection and security” do not extend beyond the customary international law minimum standard of treatment of aliens.<sup>149</sup> Hence, considerable attention will be devoted to defining the contours of the customary international law in the investment context under the NAFTA, and the issue will also likely arise as to disputes under certain bilateral investment treaties.

The trend does not mean that a system of precedent is in place, in which one Tribunal is duty bound to follow the holding of another Tribunal.<sup>150</sup> Instead, Tribunals are seeking guidance from decisions of other Tribunals in analyzing applicable legal issues.<sup>151</sup>

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“fair and equitable treatment and full protection and security”); *id.* ¶ 197 (distinguishing *Maffezini*); *Mondev*, Award, *supra* note 87, ¶¶ 67–69 (examining the award in *Feldman v. Mexico* and agreeing with it, in part, and distinguishing it, in part); *Compañía*, Award, *supra* note 87, ¶¶ 94–95 (recognizing that the Tribunal in *Azinian* declined to award costs or fees to either party); *Wena*, Award, *supra* note 87, ¶¶ 12–24 (citing to decisions of arbitration panels, including *Metalclad*, in dismissing claims for lost profits, lost opportunities, and reinstatement costs); *Metalclad*, Award, *supra* note 87, ¶ 108 (noting the similarities between the case before the Tribunal and another arbitration case, *Biloune v. Ghana Inv. Centre*, 95 I.L.R. 183 (1993), although recognizing that the “decision in *Biloune* does not bind this Tribunal”); *id.* ¶ 122 (citing to earlier arbitration decisions, including *Phelps Dodge Corp. v. Iran*, 10 Iran-U.S. C.T.R. 121 (1986), and *Chorzow Factory, Germany v. Poland*, P.C.I.J. Series A., No. 17 (1928) in support of using *Metalclad*’s actual investment as a basis for determining fair market value); *id.* ¶ 124 (citing to *Biloune* for the proposition that tax filings plus independent audit documents supporting them “are to be accorded substantial weight”); *id.* ¶ 128 (relying on *Asian Ag. Prod. v. Sri Lanka*, 4 ICSID REPORTS 245, for the ruling that interest runs from the “date when the State’s international responsibility became engaged”); *Santa Elena*, Award, *supra* note 87, ¶¶ 98–100 (citing to other international arbitral decisions to support an award of compound interest).

<sup>148</sup> NAFTA art. 1131(1).

<sup>149</sup> *Mondev*, Award, *supra* note 87, ¶¶ 100–25.

<sup>150</sup> In fact, an arbitral award under NAFTA Chapter 11 “shall have no binding force except between the disputing parties and in respect of the particular case.” NAFTA art. 1136(1).

<sup>151</sup> *Mondev*, Award, *supra* note 87, ¶ 119 (articulating the U.S. position “the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals”); *id.* ¶ 120 (recognizing that the “normal sources of international law” determine the minimum standard of treatment of foreign investors).

Second, ICSID awards vary in terms of their presentation of the factual and substantive issues. Some awards, even ones that are entered after a full evidentiary hearing on the merits, are relatively short and concise.<sup>152</sup> These awards give a brief recitation of the procedural history and the facts, and then apply the facts to the law. In instances, however, factual details are not included (presumably for confidentiality reasons). In respects, these awards resemble U.S. judicial decisions in their approach and style. At least one of the ICSID awards reflects a more European or international approach to decisions.<sup>153</sup> The *Genin* Award repeated each party's contention and gave a statement of the factual and legal support for the contention.<sup>154</sup>

### III. CONCLUSION

Arbitration is a non-judicial means of dispute resolution that is based on the parties' agreement. Arbitration of international disputes encourages orderliness, predictability, and efficiency; allows parties to remove a potential dispute from a possibly hostile foreign court; enables the parties to have their disputes resolved by those whom the parties select; and, in most instances, it has the added benefit of confidentiality.<sup>155</sup> In addition to benefiting the parties, arbitration benefits the community. As Professor Michael Reisman has observed, arbitration "gives the parties an additional contractual option for resolving disputes without engaging community structures."<sup>156</sup> The community, the world community at that, benefits because disputes are resolved efficiently and effectively without a direct cost to the community.<sup>157</sup>

The claim that the process of international commercial arbitration has become Americanized is thus a serious one. In the eyes of some of the participants in international arbitration, this process is not what they want. To the extent that arbitration occurs only because the parties choose it as a method of dispute resolution, the perception of events could be just as

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<sup>152</sup> See, e.g., *Wena*, Award, *supra* note 87; *Maffezini*, Award, *supra* note 87; *Waste Mgmt.*, Award, *supra* note 87; *Azinian*, Award, *supra* note 87; *Santa Elena*, Award, *supra* note 87; *Fedax*, Award, *supra* note 87; *Am. Mfg.*, *supra* note 87.

<sup>153</sup> *Genin*, Award, *supra* note 87.

<sup>154</sup> *Id.*

<sup>155</sup> See Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 17-18 (2002) (discussing the advantages of international commercial arbitration).

<sup>156</sup> W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1989).

<sup>157</sup> *Id.*

important as the reality. In the end, if the process fails then the community as a whole loses.

The fundamental problem with the claim that international arbitration has become Americanized is that it is based on misperceptions about the U.S. legal system. This Article has attempted to clarify the American process. Second, as the analysis demonstrates, the charge of Americanization does not completely pass the reality test. Aspects of the American judicial system have made their way into the international arbitration process, or at least into ICSID arbitrations. These American aspects, which tend to promote the full development of the facts within an orderly environment, benefit the process and promote the truth. While some of the negative aspects of Americanization have also surfaced, their role and effect have been exaggerated. Those involved in international commercial arbitration should now set aside the labels and instead focus on building a system that best suits the needs of those it serves.